PERSONS OF ABNORMAL STATUS AS BANKRUPTS.

Under the various English and American Bankruptcy Acts which declare that every person, or every natural person, or every trader, who owes debts and has committed an act of bankruptcy or filed a voluntary petition, may be adjudged a bankrupt, the liability to bankruptcy of persons of somewhat extraordinary legal status, such as clergymen,[1] members of Parliament and peers of the realm,[2] public officers,[3] outlaws,[4] convicts,[5] Indians,[6] army officers,[7] and adult wards[8] has been considered by the courts. These cases, however, are scattering and some of them are not likely to arise again. There are, however, three classes of persons who are always with us, and indeed form the vast bulk of our population, namely, married women, infants and lunatics. The decisions concerning them are quite numerous and, taken together, establish definite doctrines, which it will be the purpose of this article to develop.

Married Women.

As the disability arising from coverture differs fundamentally from that attaching to infancy and lunacy, it will be convenient to treat of married women first. Under the common law the wife's disability was complete. Her person was merged in that of her husband; hence she could grant no personal obligation. All her property was taken over by her husband, either absolutely or conditionally. She could not sue in her own name for any tort committed against her person or property. She was deprived of all civil *rights*. The law then was only logical in also relieving her of all civil *liabilities*. She was not bound on any contract nor liable for any tort, whether the contract was made or the tort com-

[1] *Ex parte* Meymout (1747) 1 Atk. 196; Hankey *v.* Jones (1778) Cowp. 745.

[2] *Ex parte* Meymout *supra; Ex parte* Griffiths (1853) 3 De G. M. & G. 173; *Ex parte* Pooley (1872) L. R. 7 Ch. App. 519; Newcastle *v.* Morris (1869) L. R. 5 Ch. App. 172; *Ex parte* Harcourt (1815) 2 Rose 203.

[3] Highmore *v.* Malloy (1737) 1 Atk. 206.

[4] *Ex parte* Burke (1868) 16 W. R. 652; *Ex parte* Stoffel (1867) 16 W. R. 237; Hamlin *v.* Crossley (1838) 8 A. & E. 677.

[5] *Ex parte* Graves (1881) L. R. 19 Ch. Div. 1.

[6] *In re* Rennie (1899) 2 Am. B. R. 182; *In re* Russie (1899) 96 Fed. 609.

[7] Audubon *v.* Shufeldt (1901) 181 U. S. 575.

[8] *In re* Kingsley (1908) 20 Am. B. R. 427.

mitted before or after marriage. All her debts were taken over by her husband. For necessaries she could bind him, not herself. It is perfectly clear that under these circumstances the wife was not liable to a civil action, and hence also not to bankruptcy. Bankruptcy proceedings would have been vain and ludicrous, there being no creditors and no property to distribute. Accordingly, it was held in *Ex parte Mear*[9] that a commission would not lie against a wife on a trading and on an act of bankruptcy committed before her marriage. The rule was so well known that in *Ex parte Harland*[10] the petitioner, who inadvertently had taken out a commission against a married woman, begged the chancellor to supersede it and relieve him from liability. In *Ex parte Johnson*[11] the question of bankruptcy or no bankruptcy depended solely on the inquiry whether the marriage was valid. The liability of a *feme covert* to bankruptcy then must rest on exceptions, and such exceptions are not an invention of modern times, but were already in existence when the first English bankruptcy law was passed.

It may be well to remark here that the equitable doctrine of the wife's separate property had no influence on her standing in a bankruptcy court. This invention of equity did not subject her person to any action. Only her separate estate might be made available. As she was not made personally liable, she could not be adjudged a bankrupt. There were, however, at least two situations at common law under which a married woman could be made a bankrupt.

The first was by a custom of London:

"Where a *feme covert* of a husband, useth any craft in the said city on her sole account; whereof the husband meddleth nothing: such woman shall be charged as a *feme sole,* concerning everything that toucheth the craft; and if the husband and wife shall be impleaded, in such case the wife shall plead as a *feme sole;* and if she is condemned, she shall be committed to prison, till she has made satisfaction; and the husband and his goods shall not, in such case, be charged nor impeached."[12]

It will readily be seen that this custom made a married woman trader liable to all the consequences of a personal judgment, in-

[9]Cooke, Bankr. Laws (8 ed.) 47.

[10](1835) 1 Deac. 75.

[11](1830) 3 Ir. Recorder 309.

[12]From the *Liber Albus* of the London town clerk, cited 3 Burr. 1776.

cluding execution and imprisonment. It followed that she could be adjudged a bankrupt.

"Every reason that induces the courts of law to make a *feme covert* personally liable for her contracts, equally operates to make her subject to bankruptcy; and it would be the height of cruelty to determine, that a woman should be taken in execution for her debts, and, at the same time, preclude her from that benefit, which the legislature affords to honest and industrious traders, sinking under the pressure of undeserved misfortune."[13]

Accordingly, married women traders of London were adjudged bankrupt in at least three cases.[14] The custom seems to have been abolished, for in 1893 a married woman "who was carrying on a separate trade in the city of London" was held not to be personally liable to bankruptcy, her estate only being liable for her debts.[15] The custom was not mentioned in this case, which would indicate that it had been abolished or had fallen into desuetude.

The other exception was the case of civil death of the husband. In the strict sense this existed only where the husband had become a monk, had abjured the realm, or been banished. Under these circumstances the law gave the wife the right to trade and to sue and be sued in contract or tort.[16] If no such exception had been made, she could have secured no credit, and could not have recovered for a trespass or for the labor of her hands. She would have been left a wretched dependent on charity or driven to the commission of crimes to obtain a precarious support. Profession dropped of its own weight during the Reformation before the first bankruptcy statute. Abjuration was abolished by statute in the 21st year of James I, while English bankruptcy legislation was still in its infancy; and banishment by Act of Parliament has very seldom been resorted to. In consequence, no cases of women traders declared bankrupt under these circumstances are to be found in the books. Judges, however, repeatedly cite it as undoubted law that a woman trader whose husband was civilly dead could be declared a bankrupt.[17]

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[13]Cooke, Bankr. Law (8 ed.) 46.

[14]*Ex parte* Carington (1739) 1 Atk. 206; the case of Mary Dennis, cited 3 Burr. 1779; Lavie *v.* Phillips (1765) 3 Burr. 1776.

[15]*Ex parte* Lynes [1893] 2 Q. B. 113.

[16]Co. Lit., 133 a.

[17]*In re* Buttler (1863) 7 L. T. R. (N. S.) 866. "An adjudication of bankruptcy could not be supported against a married woman unless her general incapacity to contract debts were removed, as where she is a sole

There is, however, a doctrine of civil death in the wider and looser sense of the word. Its boundaries are ill defined, but, whenever it existed, the wife became liable to a civil action if she owed a debt or committed a tort, and hence also to bankruptcy if she traded. Thus, a wife carried on the business formerly conducted by her husband, who had been convicted and sentenced to be deported for fourteen years. While the ship on which he was to be carried off was still in the English harbor, she was declared a bankrupt.[18] Mr. Cooke reports the case of *Ex parte Preston.*[19] where a husband assigned certain property to his wife, made an agreement for a total separation and departed for the East Indies. His wife traded, and after four years a commission was taken out against her, but the commissioners refused to declare her bankrupt. Lord Aspley, however, ordered them forthwith to do so.

The third and most important exception to the general rule is found under modern statutes which provide for the more or less complete emancipation of married women. Passing by *In re Buttler,*[20] a very interesting case which, however, rested on peculiar circumstances, we come to the Married Woman's Act of 1870. This provides, after exempting the husband from liability for his wife's antenuptial debts, that "the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried."[21] This statute, in *Ex parte Holland,*[22] was held not to render a married woman liable to bankruptcy, as her separate property only was made liable, and she was to be subject to the ordinary actions only for the purpose of reaching it. In effect her property only was made the debtor. And though it appeared in *Day* v. *Freund*[23] that a married woman had been declared a bankrupt on her own petition; in *Ex parte Jones*[24] an adjudication of a

trader according to the custom of London, or in cases of the exile or abjuration or sentence to transportation of her husband." *Per* Holroyd, Commissioner. In *Ex parte Jones* (1879) L. R. 12 Ch. Div. 484, James, L. J., in answering the assertion of counsel that married women have been made bankrupt, said: "That has been in the case of married women trading separately under a custom of the city of London or when the husband had abjured the realm or been exiled."

[18] *Ex parte* Franks (1831) 7 Bing. 762.

[19] Cooke, Bankr. Law (8 ed.) 40.

[20] (1863) 7 L. T. R. (N. S.) 866; (1864) 9 L. T. R. (N. S.) 660.

[21] 33 & 34 Vict. c. 93, s. 12.

[22] (1874) L. R. 9 Ch. App. 307.

[23] (1876) 35 L. T. R. (N. S.) 551.

[24] (1879) L. R. 12 Ch. Div. 484.

married woman, who had separate property, and had become indebted after marriage, was refused, because she could not be a debtor in respect to her separate property.

In 1882, another Married Woman's Property Act was passed, which provided: "Every married woman carrying on a trade separately from her husband shall, in respect to her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."[25]

This statute simply extended the custom of London to married women traders generally, and confined their liability to cases where they had *separate* property. Both separate property and a separate trade are necessary under this statute.[26] Either alone will not suffice. While, therefore, men and unmarried women may be adjudged bankrupts, whether they carry on trade or not, whether they have property or not, married women may only be made bankrupts if they have property and trades. A mere power of appointment is no such separate property;[27] but a life estate is.[28] A custom then grew up in England to recover against married women in the form laid down in *Scott* v. *Morley*,[29] which made the judgment and costs recoverable out of her separate estate and not otherwise, and ordered the execution to be limited to such separate property. Where such a judgment has been recovered, it has been repeatedly held that the defendant cannot on that account be made a bankrupt.[30] Where the judgment was against husband and wife jointly, and the husband had died,[31] or against a firm of which a married woman was the sole proprietor,[32] it was held that only her separate estate was affected, and she could not be made a bankrupt. Where a petition was filed against a spinster, who had the hearing postponed, and married the day before it was finally held, the court refused on account of her coverture to declare her a bankrupt.[33] Where, however, she has sepa-

[25] 45 & 46 Vict. c. 75, s. 1, sub. 5.

[26] *In re* Helsby (1893) 63 L. J. Q. B. (N. S.) 261.

[27] *Ex parte* Gilchrist (1886) L. R. 17 Q. B. D. 521.

[28] *In re* Armstrong (1888) L. R. 21 Q. B. D. 264; *In re* Wheeler's Settlement Trust [1899] 2 Ch. 717.

[29] (1887) 20 Q. B. D. 120.

[30] *In re* Gardiner (1887) L. R. 20 Q. B. D. 249; *Ex parte* Lynes [1893] 2 Q. B. 113; *In re* Elliott [1900] 2 Ir. Rep. 439; *In re* A. B. (1900) 34 I. L. T. R. 104.

[31] *In re* Hewett [1895] 1 Q. B. 328.

[32] *Ex parte* Handford [1899] 1 Q. B. 567.

[33] *In re* A Debtor [1898] 2 Q. B. 576.

rate property and carries on a separate trade, she can commit an act of bankruptcy,[34] and can be made a bankrupt, even though part of the money was furnished by her husband,[35] and even though she has actually given up business, without, however, paying her trade debts.[36] So, too, where a libel judgment had been recovered against a married woman and her husband jointly, she was declared a bankrupt on a voluntary petition.[37] A debtor's summons against the husband for debts contracted by the wife is an abuse of process.[38] From these cases, it will readily be seen that in England a married woman still has a position quite peculiar, and the cases in which she is subject to bankruptcy are the exception not the rule.

Turning now to the various States and Territories of the United States, the country of emancipation, we at once fall into a network of inconsistent views of the underlying common law, inconsistent statutes changing that law, and inconsistent decisions construing the statutes. Changing customs and sentiments regarding woman's position in the business world, have impelled both courts and legislators to give the sanction of law to a continually enlarging class of her contracts, yet a remnant of her old disabilities has everywhere remained. Some States have gone farther than others. In some the legislature and the judiciary have worked in harmony on this subject, in others one has more or less antagonized the other. The law of any one jurisdiction is in consequence complicated and hard to understand, with here a patch of law and there a patch of equity, here a statute, there a decision. To understand the law of all the jurisdictions is quite impossible. As the bankruptcy cases arise in the federal courts, but the status of the *feme covert* is determined by the state law—as are many other questions in bankruptcy,—the duty of the bankruptcy court in any particular case would be to examine the whole law as to her liability in that State, and thus determine her status and administer the bankruptcy law accordingly. This, of course, is a task of the greatest magnitude, and we need not wonder that judges have sometimes avoided it, preferring to rest their decisions on some short ground. It is sometimes hard to understand

[34] *In re* Gordon (1897) 31 I. L. T. R. 87.

[35] *In re* Edwards (1895) 2 Manson 182.

[36] *In re* Dagnall (1896) 65 L. J. Q. B. (N. S.) 666; *In re* Worsley [1901] 1 K. B. 309.

[37] *Ex parte* Abbott (1868) 16 W. R. 651.

[38] *Ex parte* Shepherd (1879) L. R. 10 Ch. Div. 573.

why in one case a married woman was declared bankrupt, while, with similar laws and pleadings and under similar circumstances, a different result was reached in another State. There is no doubt that in most, if not all the States, a *feme covert* may under some circumstances be adjudged a bankrupt.[39] It has been held that a married woman cannot be forced into bankruptcy where she has not taken out a license required by law,[40] or where it is not averred that she has separate property.[41] On the other hand, it has been held that a married woman may be declared a bankrupt if she has carried on business through her husband,[42] or traded after being abandoned by him,[43] or in partnership with him,[44] or alone,[45] or if she has lived separate for years,[46] or merely has property of her own,[47] or in community with her husband,[48] or if she is liable for the debt only in equity.[49] Her husband need not be joined.[50]

These are all the decided cases and, as will be seen, they are exceedingly scattering both as to time and place, and are not very satisfactory because they are often incompletely dovetailed into a state of the law that is continually changing.[51] Viewing all the decisions, English and American, we must agree with the proposition laid down by Cooke more than 100 years ago:

"The criterion therefore, of a *feme covert* being capable of falling under the bankrupt laws appears to be, her liability to be sued to execution for the debts she has contracted during coverture. A commission of bankrupt is considered as a statute execution.

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[39]*In re* O'Brien (1873) 1 N. B. R. 176; Taylor *v.* Moore (1897) 64 Ark. 23; Stratton *v.* Edwards (1899) 174 Mass. 374; *In re* Meyers (1899) 96 Fed. 408; *In re* Steele (1899) 98 Fed. 78; *In re* Johnson (1907) 149 Fed. 864; *In re* Hyman (1899) 97 Fed. 195; Lawver *v.* Gladden (Pa. 1885) 1 Atl. 659.

[40]*In re* Slichter (1869) 2 N. B. R. 336. This case is wrong, at least in its reasoning, since the decision is based upon the lack of *right*, instead of the lack of *liability*, in the married woman.

[41]*In re* Goodman (1873) 5 Biss. 401; *In re* Howland (1868) 2 N. B. R. 357.

[42]Graham *v.* Stark (1869) 3 Ben. 520.

[43]*In re* Ruddell (1872) 2 Low. 124.

[44]*In re* Kinkead (1873) 3 Biss. 405.

[45]*In re* Collins (1873) 3 Biss. 415.

[46]*In re* Lyons (1874) 2 Sawy. 524.

[47]Binney *v.* Globe Nat. Bank (1890) 150 Mass. 574.

[48]In the Matter of Ray (1899) 1 Nat. Bankr. News 276.

[49]McDonald *v.* Tefft-Weller Co. (1904) 128 Fed. 381.

[50]Lastrapes *v.* Blanc (1878) 3 Woods 134.

[51]For the earlier cases, see an article "Married Women as Bankrupts," 13 Am. Law Reg. 129.

If a married woman is so circumstanced as to be subject to a common law execution, there does not occur any reason why she should not likewise be subject to the statute execution."[52]

So far as a wife is personally liable for her debts (and, in England, trades), she is subject to the bankruptcy law as though sole, whether her disabilities have been removed by custom, common law, or statute. It follows that she may commit an act of bankruptcy,[53] or file a voluntary petition.[54] Wherever a plea of coverture would not avail her in an action on the debt, she could and can generally be proceeded against in bankruptcy.

INFANCY.

Passing now to the consideration of infancy and lunacy, it may be well to call attention to certain fundamental differences between them and coverture at common law. The disabilities of married women arose from lack of property, those of infants and lunatics from lack of discretion. The latter are liable for their torts, the married woman can only render her husband liable. A married woman cannot become liable for necessaries, while it is well settled in the case of infants, and only less well in the case of lunatics,[55] that they are personally liable for necessaries. The contracts of married women are void, those of infants and lunatics only voidable. At common law, infants and lunatics could acquire property for themselves, the *feme covert* only for her husband.

While infancy and lunacy thus have many things in common, they are in other respects quite dissimilar. Infancy exists for a definite time, can never be interrupted, and an infant can never have been anything but an infant. As to lunacy, its duration is uncertain at both ends; there may be lucid intervals, and the lunatic may have been, and usually has been, *sui juris*. Infancy is an easy question of law. Insanity is a difficult question of fact. The mind of the infant is immature. That of the lunatic is defective. Courts of equity consider themselves the guardians of infants, but not of lunatics. Cases of bankruptcy arising as to infants will, therefore, generally be guides as to what will be done in a corresponding lunacy case; but many situations may arise in the cases of lunatics which are peculiar, and could never arise in connec-

[52]Cooke, Bankr. Laws (8 ed.) 40.

[53]See cases cited *supra*.

[54]*In re* Collins and *Ex parte* Abbott *supra*.

[55]Rhodes *v.* Rhodes (1889) L. R. 44 Ch. Div. 94.

tion with an infant. It will accordingly be well to discuss the two separately, and to treat first of infancy.

It has been well understood in England that an infant could not generally be made a bankrupt. His contracts being voidable, there was no indebtedness, no liability on which to found bankruptcy proceedings. To quote from the cases: "Though the debts of an infant are only voidable by him at his election; yet no man can be a bankrupt for debts which he is not obliged to pay."[56] "Notwithstanding Lord Macclesfield held in the case of one Whitlock[57] that an infant might be a bankrupt yet it has been determined otherwise since."[58] "An infant or a lunatic cannot be a bankrupt."[59] "Being a minor [he] could not be a bankrupt."[60] "A commission issued against an infant certainly cannot be supported but is absolutely void."[61] Accordingly, commissions issued against infants have been superseded,[62] and an infant has been allowed to recover against his assignee in bankruptcy, on the ground that the commission was altogether invalid.[63]

These decisions did not rest on the dogma, often asserted in cases and text-books, that an infant could not trade and hence could not be made a bankrupt under laws covering only traders. For an infant could trade. Where, however, an infant tried to use his credit, a practical difficulty arose. As the law would not hold him liable, prudent business men would refuse to extend credit to him. Hence, an infant could not generally be a trader unless he dealt entirely on a cash basis, and then, of course, there could be no possibility of bankruptcy.

That infants could be traders is conclusively shown by the

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[56]*Per* Holt, C. J., in Rex *v.* Cole (1699) 1 Ld. Raym. 443.

[57]That case is reported in Sel. Cas. Ch. 46, as follows: "A person being under the age of twenty-one bought goods and after the age of twenty-one committed an act of bankruptcy in respect of those goods on which a commission issued. Lord Chancellor Macclesfield doubted whether he might not be a bankrupt; but the chancellor was clear of opinion he could not; and said, if commissioners find a man a bankrupt who is not so, action will lie against them." Here there was, first, no holding on the part of the chancellor, but merely a doubt, and, secondly, there was no infant before the court. Lord Hardwicke's statement in respect to this case is thus not borne out.

[58]*Per* Hardwicke, L. C., in *Ex Parte* Sydebotham (1742) 1 Atk. 146.

[59]*Per* Willes, J., in Crispe *v.* Perrit (1744) Willes 467, 473.

[60]*Per* Eldon, L. C., in *Ex parte* Adam (1813) 1 Ves. & B. 492.

[61]*Per* Burrough, J., in O'Brien *v.* Currie (1828) 3 Car. & P. 283.

[62]*Ex parte* Barwis (1802) 6 Ves. 601; *Ex parte* Hehir (1833) 3 Deac. & C. 107; McLean *v.* Dummett (1869) 22 L. T. R. (N. S.) 710.

[63]Belton *v.* Hodges (1832) 9 Bing. 365.

anomalous estoppel doctrine, which developed in England during the nineteenth century. Beginning with cases in which Lord Eldon merely refused to supersede a commission,—because it had been taken out against the then infant five[64] or two[65] years before,—leaving the petitioner to his action at law, the doctrine developed that an infant trader by conduct or express misrepresentation as to his age, might estop himself from later disaffirming contracts made during infancy, and hence could be adjudged a bankrupt on account of these debts. Accordingly, Sir John Cross refused to supersede the commission of an infant, though no great lapse of time had intervened.[66] The doctrine at length found full expression in *Ex parte Unity Banking Association, Re King.*[67] It was not applied, however, where the creditor had full knowledge of the infancy,[68] nor where the infant merely entered a partnership, though his name appeared in the Gazette,[69] or was painted over the door.[70] This was the situation when the Infant's Relief Act[71] was passed in 1874, making all the contracts of an infant, with some exceptions not here material, void. Notwithstanding this statute, *Ex parte Lynch* clung to the old doctrine,[72] though it is impossible to understand how one can be estopped from disaffirming a void contract.[73] A contrary view was therefore taken in Ireland;[74] and *Ex parte Lynch* was severely criticized in *Miller* v. *Blankley,*[75] and squarely overruled in *Ex parte Jones.*[76] Though Jessel said expressly in the latter case, that he did not overrule the earlier estoppel cases, the doctrine has never since been successfully invoked in England and undoubtedly never will be, so long as the Infant's Relief Act is law. No case involving this doctrine has arisen in America, and it is doubtful what effect would be given to it in the absence of a statute declaring the infant's contracts void. Under an Iowa statute providing that

[64] *Ex parte* Moule (1808) 14 Ves. 602.
[65] *Ex parte* Watson (1809) 16 Ves. 265.
[66] *Ex parte* Bates (1841) 2 Mont. D. & De G. 337.
[67] (1858) 30 L. T. R. 246; 31 L. T. R. 124, 242.
[68] *Ex parte* Hehir (1833) 3 Deac. & C. 107.
[69] McLean *v.* Dummett (1869) 22 L. T. R. (N. S.) 710.
[70] *Ex parte* Lees (1836) 1 Deac. 705.
[71] 37 & 38 Vict. c. 62 s. 1.
[72] (1876) L. R. 2 Ch. Div. 227.
[73] See an article "Infants in Bankruptcy," 71 L. T. 47
[74] *In re* Rainey (1880) 3 L. R. Ir. 459.
[75] (1878) 38 L. T. R. (N. S.) 527.
[76] (1881) L. R. 18 Ch. Div. 109.

"No contract can be thus disaffirmed where on account of the minor's own misrepresentation as to his majority or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting," an infant trader has, however, been declared bankrupt on his own petition.[77]

The few remaining English cases are affected more or less by the Infant's Relief Act, but are unanimous in the proposition that an infant's contracts being void, he cannot be made a bankrupt,[78] and cannot even ratify the transaction after coming of age.[79] It has also been held in England that equity will not supersede the commission, where an infant has been adjudged a bankrupt and has not within the period prescribed by the statute begun an action to annul the fiat.[80]

In America, the same result has been reached, the infant generally being held not liable to bankruptcy.[81] "The authorities make it pretty clear that an infant cannot generally be made an involuntary bankrupt and sound reasoning leads to the same result."[82] "Ordinarily the conclusion that a minor cannot figure in the bankruptcy court is correct." [83] In *Re Eidemiller*,[84] it was held that, since an infant could repudiate his debt on reaching majority, he could not be made a bankrupt.

There are, however, some exceptions to the general rule. The first of these is the case where a minor has committed a tort and the damages have been liquidated by a judgment. Under these circumstances the law imposes an absolute duty on him to pay the judgment debt, and in default of payment he may become liable

[77] *In re* Brice (1899) 93 Fed. 942.
This case is valuable as bringing out forcibly the fact that the question of bankruptcy does not depend upon the insolvent's rights, but on his liabilities.

[78] The Queen *v.* Wilson (1879) L. R. 5 Q. B. D. 28; *In re* Soltykoff [1891] 1 Q. B. 413; *In re* Beauchamp [1894] 1 Q. B. 1; Lovell *v.* Beauchamp [1894] App. Cas. 607.

[79] *Ex parte* Kibble (1875) L. R. 10 Ch. App. 373.

[80] *In re* West (1853) 21 L. T. R. 277.

[81] In the Matter of Walter S. Derby (1872) 6 Ben. 232.

[82] *In re* Dunnigan (1899) 95 Fed. 428.

[83] *In re* Duguid (1900) 100 Fed. 274, 276. *Per* Purnell, J.: "Who can prophesy with any certainty what course an infant will adopt with reference to such debts after attaining his majority? The uncertainty of such course is even greater than the four over which the wise man, Solomon, was perplexed, as recorded in Proverbs. Guardians and others who have had experience can testify feelingly on this subject. Those who have not had experience, but contemplate testing the matter, will be entitled to do so at a future period. To the former it is regarded as grounds where fools rush in, but angels fear to tread."

[84] (1900) 105 Fed. 276.

to bankruptcy. The first case decided on this point was *In re Book*,[85]—which is often misunderstood and cited as contrary to *In re Derby*. It is very meagerly reported and consists merely of five questions certified to the circuit court from the district court and laconically answered. The second question reads: "Whether the *infancy of the applicant* is good grounds of opposition to his discharge as a bankrupt." The fourth is as follows: "Whether a judgment in a court of law *obtained in an action of tort* is a debt dischargeable under and by force of the bankrupt law." Taking these two questions together it is clear that we have here the case of recovery against an infant in a tort action. The answer to the second question now becomes intelligible. It is as follows:

"An infant is *bound* to pay certain debts. The bankrupt law extends its benefits to all persons who are in a state of bankruptcy, without exception as to persons; fiduciary debtors only are excepted. An infant, therefore, may claim the benefit of the bankrupt law. When an infant brings his case within the bankrupt law, the law vests his property in the assignee."

The doctrine of this case therefore is that, since an infant is liable on a judgment recovered in a tort action he may file a voluntary petition and on it be declared a bankrupt. This is the law both in England and America.[86]

The only case to the contrary is *In re Cotton*.[87] There bastardy proceedings and a seduction action had been successful against a minor who, in default of payment, had been put in jail. He filed a petition as a means of securing his liberty. Judge Judson, after much deliberation and after getting the opinion of one of the "greatest jurists of the country" (he does not favor us with the name), said that, as there were no precedents, and as the judgment for seduction did not merge the original cause of action so completely as to prevent the court from taking notice of it, "the court will adopt that construction which shall not encourage evil and crime but promote virtue and protect innocence." In consequence, he dismissed the petition.

This case is open to a threefold criticism. There *was* a precedent the other way. *People* v. *Mullin, supra,* had been decided two years before in a neighboring State. The *Cotton* case, if logically

[85](1843) 3 McLean 317.

[86]People *ex parte* Smith *v.* Mullin (N. Y. 1841) 25 Wend. 608; *In re* Smedley (1864) 10 L. T. R. (N. S.) 432; *In re* Pensansky (1902) 8 Am. B. R. 99. See an article "Infant Bankrupts", 45 L. T. 326.

[87](1843) Fed. Cas. No. 3269.

developed, would wipe out the doctrine of merger of causes of action, which, while technical, is very useful and cannot well be spared. If for the reasons given by the court, a minor cannot file such a petition, it would follow that an adult could not do so, for an adult would certainly not be less frowned upon than an infant. Hence a person for a mere tort (aggravated, though it was) might be imprisoned for life. Further, the court would have been justified in dismissing the petition without going into this question at all. The answer to the petition set out "that this last judgment was not perfected when the petition was filed, because the bill of costs had not been taxed until the day subsequent to the presentation of the petition." This point the court merely ignored; but the petition could probably have been dismissed on that ground. At any rate, the case is decidedly against reason and authority, and is not law.

The second exception is found in the case of necessaries. It is quite well established that the infancy of the debtor will not protect him against a quasi-contractual liability for necessaries. That forms as clearly the basis of suit, recovery and execution against the infant as does a tort. It would follow that he could be made a bankrupt in a proper case. There is, however, no authority for such a conclusion. The question has not come up squarely for decision. In *Farris* v. *Richardson*,[88] where at least one of the creditors of the infant had a claim for necessaries, the court declared the whole proceeding void because no guardian had been appointed. In *Re Soltykoff*,[89] the petition was brought by the indorsee of a note given by the infant for necessaries; but the court held that, since the note was void under the Infant's Relief Act, the petition must be dismissed, and intimated that the same fate would have overtaken a petition by the payee of the note. In *Re Derby*,[90] Blatchford, *J.*, while holding an infant not liable to bankruptcy, said: "It is not intended to express any opinion as to whether an infant may or may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessaries." In *Re Duguid*,[91] Purnell, *J.*, said: "Whether a debt for necessities would support a petition or not does not arise, but even this was an open question in England in 1891."

The question whether an infant can commit an act of bank-

[88] (Mass. 1863) 6 Allen 118.
[89] [1891] 1 Q. B. 413.
[90] (1872) 6 Ben. 232.
[91] (1900) 100 Fed. 274, 277.

ruptcy has been under review in only one case, namely, *In re Jones*,[92] Here the infant had bought coke and breeze from petitioner, and becoming embarrassed, had presented a liquidation petition which however failed. His creditor now sought to have him declared bankrupt, contending that the filing of the liquidation petition was an act of bankruptcy. The Chancery Division so held. The Court of Appeal, however, reversed this decision on the ground that no legal debt existed against the infant, the contract with petitioner being void under the Infant's Relief Act. The judges, however, intimated that a different result would have been reached if the contract had been for necessaries. It follows that where the obligation is void or voidable no act of bankruptcy on the part of the infant is possible. Where, however, a valid obligation exists against him it would seem that he can commit such an act, provided the act itself is not voidable. Such valid claims would be on a contract for necessaries or a judgment for tort.

It is quite clear that a guardian must be appointed for the infant in involuntary cases;[93] and, though *In re Book*[94] decides that this is not necessary in a voluntary case, it would not be advisable to omit it.[95]

As to ratification, the infant cannot ratify in such a manner as to make proceedings taken during his infancy valid, especially when the rights of third persons would be injured thereby.[96] But it is quite clear on general principles that if he ratifies a contract after coming of age, a valid debt is thereby created, which will make him liable to bankruptcy.[97] Where, however, his contract is void by statute, he cannot ratify it.[98]

LUNACY.

This brings us to the consideration of the insolvent lunatic. There is no branch of the law of greater intricacy or more beset with pitfalls at every turn, than that relating to lunatics. But when

[92](1881) L. R. 18 Ch. Div. 109, 119. *In re* Brice and the tort cases *supra*, were all voluntary cases, and hence did not involve this question. The estoppel cases all arose, with the exception of *In re* Jones, after the infant had come of age.

[93]Farris *v.* Richardson (Mass. 1863); 6 Allen 118; *In re* Derby (1872) 6 Ben. 232; Hill *v.* Keyes (Mass. 1865) 10 Allen 258; Winchester *v.* Thayer (1880) 129 Mass. 129.

[94](1843) 3 McLean 317.

[95]*In re* Burka (1901) 107 Fed. 674.

[96]*In re* Derby (1872) 6 Ben. 232.

[97]Stevens *v.* Jackson (1815) 4 Campb. 164.

[98]*Ex parte* Kibble (1875) L. R. 10 Ch. App. 373.

the element of insolvency is superadded, the arising complication becomes baffling and almost hopeless of solution. There are many kinds of lunatics, ranging from the mere crank to the raving maniac. There is general insanity and mere monomania. A man totally insane in one respect may nevertheless be otherwise perfectly sane. The time of insanity is uncertain both as to its beginning and as to its end, and may even be interrupted in the middle by lucid intervals of longer or shorter duration. Medical science has still much to do to clear up this subject. It is clear then that the law in order to reach any result at all must operate largely with presumptions.[99] Where, therefore, a petition was filed before the debtor was declared insane, and the adjudication in lunacy did not reach back to the time when the alleged act of bankruptcy was committed, the court presumed that he was sane at the time and refused to dismiss the petition.[100]

It may readily be seen that the time when the insolvent becomes insane is of the highest importance in determining his liability to bankruptcy. He may lose his reason (1) before contracting the debts; (2) after contracting the debts but before the act of bankruptcy; (3) in the interval between the act of bankruptcy and the filing of the petition; (4) after the petition is filed. The last case is fully covered by section 8 of the National Bankruptcy Law of 1898, which reads:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane."

Therefore a bankrupt who has become insane after the adjudication may be discharged,[101] and some other person may be authorized by the court to sign his affidavit, where that is required by the statute.[102] *In re Murphy,*[103] where the trustee in bankruptcy was ordered to deliver back to the insolvent his property on proof of insanity at the time of *adjudication,*—is *contra,* but was decided under the law of 1867, is very meagerly reported, and has been criticized in *Re Weitzel.*[104]

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[99]Jones, Evidence (2 ed.) sec. 59.

[100]*In re* Kehler (1907) 153 Fed. 235; Matter of Cashman (1909) 21 Am. B. R. 284.

[101]*In re* Miller (1904) 133 Fed. 1017.

[102]*Ex parte* Roberts (1840) 1 Mont. & C. 653; *Ex parte* May (1841) 2 Mont. D. & De G. 381.

[103]10 N. B. R. 48.

[104](1876) 7 Biss. 289.

While the case in which bankruptcy precedes lunacy is thus clear under the law of 1898, the case in which lunacy precedes bankruptcy is fairly bristling with difficulties. It is not covered by any legislation in this country, and the cases upon this point are far from satisfactory and more or less conflicting.[105]

It is clear that a lunatic is liable to bankruptcy, if his lunacy intervenes between the act of bankruptcy and the filing of the petition. Says Lord Eldon: "A commission of lunacy will not protect a lunatic against an action, and a commission of bankruptcy is a species of action against which the lunacy cannot be a defense."[106] Since a debtor is not protected from an ordinary action by lunacy, it would follow that, where he has committed an act of bankruptcy, he will not be protected against a petition in bankruptcy.[107]

Whether the debts (without which, of course, there can be no act of bankruptcy and no petition in bankruptcy) are created before or during the lunacy is of no consequence, so long as they are legally binding on the lunatic before the alleged act of bankruptcy. A lunatic may become indebted in four ways: (1) He may have contracted the debts while sane. (2) He may have committed a tort while sane or insane, and recovery had against him while insane. (3) He may have been supplied with necessaries, and become liable therefor. (4) In a limited number of cases, he may even be liable on his contracts made as a lunatic:

"If a person in good faith enters into a contract with one apparently sane, and whose actions would in no way tend to put a reasonably prudent man on his guard, and a valuable consideration has been paid, there being no undue advantage taken and no unfairness in the bargain, and the consideration cannot be restored by the insane person, so as to place the other party *in statu quo*, then, whether the party be sane or insane the contract will be good." [108]

If the lunatic has become indebted in any of these four ways, he is liable to an action, and hence to a petition in bankruptcy, if he commits an act of bankruptcy.

This brings us to the difficult and controverted question: Can a lunatic commit an act of bankruptcy? It has been said in England that litigation involving this question would probably end

[105]See an article "Lunatic Bankrupts," 45 Sol. Jour. & Rep. 734.
[106]Anon. (1807) 13 Ves. 590.
[107]*In re* Pratt (1872) 2 Low. 96.
[108]38 Cent. L. J. 226.

only in the House of Lords.[109] The authorities are not uniform on the question, and must be closely scrutinized.

It can be safely laid down that a lunatic cannot commit an act of bankruptcy which involves any volition or intention. It has been held that he cannot commit an act of bankruptcy by a transfer with *intent* to hinder, delay or defraud his creditors,[110] or with *intent* to give a preference,[111] nor suffer his property to be taken with *intent* to defeat and delay the operation of the Bankruptcy Act.[112]

On the other hand, a debtor who failed to appear to a debtor's summons, being confined to an insane asylum, was declared a bankrupt under a statute which in effect made his mere non-appearance an act of bankruptcy.[113] In *Re Farnham*,[114] a debtor, one year after being declared a lunatic, was forced into bankruptcy, "the act of bankruptcy being the seizure of some of his goods in execution under a judgment * * * the retainer of the goods by the sheriff for upward of twenty-one days and a subsequent sale." It is clear that these acts of bankruptcy involved no volition on the part of the bankrupt. Mere inaction was sufficient, and of that the lunatic is certainly not incapable.

Looking at these two lines of cases our conclusion must be that "a lunatic cannot by himself or next friend commit a *voluntary* act of bankruptcy;"[115] but that he is capable of an involuntary act. Therefore, Petersdorf says in his Abridgment:

" But can a lunatic commit an act of bankruptcy? No intent can be imputed to him; he cannot be said, I conceive, to have an intent to delay or defraud his creditors. All the acts of bankruptcy requiring such an intent, I should think he was incapable of committing. But lying in prison for two months after an arrest is an act of bankruptcy without such an intent. If, therefore, a lunatic was arrested and lay so long in prison, I should think a commission of bankruptcy would be supported just as if he was in his sound mind. He cannot be examined but his property may be distributed amongst his creditors like that of a bankrupt who dies after opening the commission." [116]

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[109] *In re* Farnham [1896] 1 Ch. 836.

[110] *In re* Ward (1908) 161 Fed. 755.

[111] *In re* Funk (1900) 101 Fed. 244.

[112] *In re* Marvin (1871) 1 Dill. 178.

[113] *Ex parte* Farr (1864) 10 L. T. R. (N. S.) 44.

[114] [1895] 2 Ch. 799; [1896] 1 Ch. 836.

[115] *Per* James, J., in *Ex parte* Cahen (1879) L. R. 10 Ch. Div. 183, 184.

[116] Vol. 3, p. 310.

It remains to examine the other cases in point, to see whether they contain anything at war with this conclusion. In *Ex parte Priddy*[117] it was decided that "a lunatic while under the influence of that dreadful visitation cannot commit an act of bankruptcy." In *Re Weitzel,* it was held that "an insane person cannot commit an act of bankruptcy."[118] *Ex parte Carruthers*[119] seems to hold that a lunatic cannot be a bankrupt. In *Crispe* v. *Perrit,*[120] Willis, *J.,* said: "An infant or a lunatic cannot be a bankrupt." In all these cases, so far as they are decisions at all, it does not appear what was the particular act of bankruptcy alleged. It is probable, or at least possible, that it was a voluntary act, and if so, the cases are in full accord with our conclusion.

This leaves but two cases to be disposed of. *Ex parte Stamp*[121] is correctly summarized in the head-note as follows: "*Semble,* that a lunatic cannot commit an act of bankruptcy by omitting to pay or give security." The facts of the case were, that a joint petition was taken out against the lunatic and A, and a separate petition against A. The joint commission was superseded, and the separate commission allowed to stand. The chancellor in his judgment merely threw out the question: "Can such a person [a lunatic] commit an act of bankruptcy, by omitting to give a bond?" In *Re Marvin,*[122] a voluntary and an involuntary act of bankruptcy were alleged against the lunatic, but the court in a very short opinion, without citing authorities or giving any reasons, decided that a lunatic could not commit an act of bankruptcy, and dismissed the petition. This decision was as right as to the voluntary act alleged, as it was wrong in respect to the involuntary. It will be readily seen that these two cases are not strong as authority and should not be allowed to overthrow the distinction between voluntary and involuntary acts of bankruptcy, which rests not only on sound reason, but on authority just as strong if not stronger than *In re Marvin* and *Ex parte Stamp.*

Can a lunatic file a voluntary petition? It appears from *Saunders* v. *Mitchell,*[123] that he has been allowed to do so. *In re*

[117] Cooke, Bankr. Law (8 ed.) 48.

[118] (1876) 7 Biss. 289.

[119] 3 Petersdorf. Abr. 310, (1733) Davies 468.

[120] (1744) Willes 467, 473.

[121] (1846) 1 De G. 345.

[122] (1871) 1 Dill. 178.

[123] (1883) 61 Miss. 321.

Weitzel[124] doubted it; and *In re Eisenberg*,[125] at last decided, that as the lunatic was not a "qualified" person,[126] he could not by himself or guardian file a voluntary petition. To the same effect is *Ex parte Cahen*,[127] in England. It should be noted, however, that in England a lunacy court may order the committee of a lunatic to do anything which, in the judgment of the court, would be to his benefit.[128] Hence through this means the voluntary petition of a lunatic may be brought before a court of bankruptcy.[129]

As to the lunatic's liability to bankruptcy on a tort judgment or a judgment for necessaries, there are no authorities, but the principles applicable to such cases, where an infant is involved, would seem to apply.

It was settled in *Re Burka*,[130] in an opinion which outlined the whole procedure in the appointment of a guardian in infancy and lunacy cases, that the lunatic must be represented by a guardian *ad litem* before the court will take up the matter at all.

It may not be amiss to add a few words concerning the situation when a person not liable to bankruptcy is a member of a partnership against which a petition is brought. After much hesitation in the English courts,[131] the question was at last settled in the House of Lords in *Lowell* v. *Beauchamp*,[132] where it was held that while an infant partner could not be made a bankrupt, judgment could be entered against the firm "other than the infant." The reason of this decision would apply equally well where the partner was a married woman[133] or a lunatic.

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[124](1876) 7 Biss. 289.

[125](1902) 117 Fed. 786.

[126]Nat. Bankr. Act of 1898, sec. 59a.

[127](1879) L. R. 10 Ch. Div. 183.

[128]*In re* Lee (1883) L. R. 23 Ch. Div. 216; *In re* James (1884) L. R. 12 Q. B. D. 332; *In re* Farnham [1896] 1 Ch. 836. See 16 Harv. L. Rev. 56.

[129]*In re* R. S. A. [1901] 2 K. B. 32.

[130](1901) 107 Fed. 674.

[131]*Ex parte* Carruthers (1733) Davies 468; 3 Petersdorf. Abr. 310; Crispe *v.* Perrit (1744) Willes 467; *Ex parte* Henderson (1798) 4 Ves. 163; *Ex parte* Layton (1801) 6 Ves. 434, 440; *Ex parte* Barwis (1802) 6 Ves. 601; Goode *v.* Harrington (1821) 5 B. & A. 147; *Ex parte* Adam (1813) 1 Ves. & B. 493; *Ex parte* Lees (1836) 1 Deac. 705; *Ex parte* Addison (1838) 3 Deac. 54; *Ex parte* Stamp (1846) 1 De G. 345; In the Matter of West (1853) 3 De G. M. & G. 198.

[132][1894] App. Cas. 607, 614. *Per* Lord Ashbourne: "It would be most unfortunate if the adult members of a partnership could evade liability because one of the partners was a minor. If this was laid down minors would be found in many partnerships."

[133]*Ex parte* Handford [1899], Q. B. 566.

In America, practically the same result has been reached. It is held that where the *corpus* of the firm (whatever that may be) is in court, the court will adjudicate the firm a bankrupt and merely disregard the member who is not liable to bankuptcy. Thus, firms having as a partner a married woman,[134] an infant,[135] or a lunatic[136] have been adjudged bankrupt.

To sum up: A married woman is at common law absolutely incapable of having debts, of being sued, or of committing an act of bankruptcy. Where, however, either by the civil death of her husband, or by the custom of London, or by special statute, her disability has been wholly or partly removed, she becomes *sui juris,* to the extent to which she has become liable to an ordinary action, and no further, and can contract debts, and commit any act of bankruptcy, and may either file a voluntary petition or be forced into bankruptcy.

The contracts of infants and lunatics are generally voidable, and hence are not such obligations as will afford a foundation either for voluntary or for involuntary proceedings. Both infants and lunatics, however, are liable absolutely for necessaries and on judgments for torts, and in addition the lunatic may owe debts contracted while sane, and may even contract certain debts during lunacy. Though such debts do not make them *sui juris,* nevertheless it would seem that an act of the infant debtor which he cannot later avoid may be an act of bankruptcy; while acts of bankruptcy of lunatics are limited to such as involve no volition. It is clear that voluntary petitions are proper at the suit of infants;[137] but to lunatics they have been denied both in England and America.[138] It has been held, however, in England that a lunacy court can empower the committee in lunacy to do anything for the benefit of the lunatic, including the filing of a voluntary petition.

It can be laid down as a general rule that wherever a plea of coverture, infancy, or insanity would be of no avail to the defendant in an ordinary action, it would be of no avail against bankruptcy proceedings, if the defendant has committed an act of

[134] *In re* Kinkead (1873) 3 Biss. 405; Lastrapes *v.* Blanc (1878) 3 Woods 134.

[135] Winchester *v.* Thayer (1880) 129 Mass. 129; *In re* Dunnigan (1899) 95 Fed. 428; *In re* Duguid (1900) 100 Fed. 274.

[136] *In re* L. Stein & Co. (1904) 127 Fed. 547.

[137] See *In re* Brice and the tort cases *supra.*

[138] *In re* Eisenberg, *In re* Cahen *supra.*

bankruptcy. And where the person of abnormal status owes debts which are personally and absolutely binding on him, and on which he can be sued, he may present a voluntary petition. In every case, the question of bankruptcy of the insolvent depends upon his civil *liabilities,* and not upon his civil *rights.*[139]

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[139] *In re* Brice *supra.*